

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD FRED HARRIS,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 225566

Oakland Circuit Court

LC No. 99-165392-FH

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree fleeing and eluding, MCL 750.479a(3), and driving on a suspended license, MCL 257.904(1)(b).¹ Defendant was sentenced as a fourth habitual offender to one and one-half to twenty years' imprisonment for the fleeing and eluding conviction and to twenty-three days' imprisonment for the driving on a suspended license conviction. We affirm.

Defendant first argues that the trial court erred by admitting his driving record into evidence because the defense offered to stipulate that defendant's driving privileges had been suspended at the time of his arrest. A trial court's decision to admit evidence will not be reversed by this Court absent an abuse of discretion. *People v Crear*, 242 Mich App 158, 169; 618 NW2d 91 (2000).

A defendant's stipulation of a fact at trial does not alter the prosecution's burden of proving every element of a crime beyond a reasonable doubt. *People v Mills*, 450 Mich 61, 69-71; 537 NW2d 909, mod 450 Mich 1212; 593 NW2d 504 (1995). In the instant case, the prosecution had the burden to prove that defendant fled and eluded the police. The prosecution sought to introduce defendant's extensive driving record into evidence to show motive for that offense. The trial court further found defendant's driving record more probative than prejudicial. Consequently, we find the trial court did not abuse its discretion by admitting the driving record into evidence.

¹ We note that this statute was amended by 1998 PA 342, effective October 1, 1999.

Defendant next claims that it was error for the trial court to deny defendant the opportunity to present surrebuttal evidence.² We review a trial court's decision regarding rebuttal testimony for an abuse of discretion. *People v Humphreys*, 221 Mich App 443, 446, 561 NW2d 868 (1997).

The trial court erred in concluding that the defense is never entitled to surrebuttal evidence. See *People v McIntire*, 232 Mich App 71, 115; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999). However, we find that this error was harmless. MCR 2.613(A). Defendant testified that he was robbed on February 14, 1999 and that a police report was made that night. Thus, defendant was able to establish his defense that he was overcome with fear because of the robbery and as a result was unaware of the police officers' attempts to stop his vehicle. On cross examination defendant further explained that on May 6, 1999, he was merely picking up a copy of the February 14, 1999 police report. Defense counsel was also given the opportunity to examine the police inspector's rebuttal testimony that contradicted defendant's testimony on that issue. Thus, the issue was sufficiently before the jury and defendant has failed to show that any new or additional information would have been provided by his surrebuttal testimony.

Defendant also maintains that the prosecution failed to present sufficient evidence on the issue of knowledge to support the jury's verdict of guilt beyond a reasonable doubt. In reviewing a sufficiency of the evidence claim, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

This Court will not "interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). The testimony of Michigan State Police Sergeant Richard Hayward established that he followed defendant in a fully marked police car with the lights flashing and siren blaring for several blocks. Sergeant Hayward further testified that during the pursuit defendant's speeds exceeded the posted limits, that defendant failed to obey traffic signs, and that defendant failed to stop until he reached a dead-end street. Defendant's contention that his failure to notice the police cars was justifiable, given Sergeant Hayward's testimony that he was unaware that another police vehicle was behind him, is irrelevant. Viewing the evidence in the light most favorable to the prosecution, we find that a reasonable juror could conclude that defendant's erratic actions during the police pursuit indicated his awareness of the police officers' attempts to stop his vehicle.

Defendant further purports that his sentence violates the principle of proportionality.³ This Court must affirm a minimum sentence imposed within the sentencing guidelines' range absent an error in the scoring of the guidelines or in the event that inaccurate information was

² Defense counsel requested to recall defendant to explain that he only requested a copy of the police report on May 6, 1999.

³ The instant offense was committed after January 1, 1999, and is subject to the statutory sentencing guidelines. MCL 769.34(2).

utilized to determine a defendant's sentence. MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Pursuant to the statutory guidelines, the minimum sentencing range for defendant's offense was twelve to twenty-four months. However, because defendant was sentenced as a fourth habitual offender the upper end of the minimum range was doubled. MCL 777.21(3)(c). Therefore, the applicable minimum sentence for defendant was twelve to forty-eight months. Defendant's minimum sentence of one and one-half years is clearly within this range and we must affirm the sentence.⁴

Lastly, defendant claims that he was denied effective assistance of counsel. Because defendant did not request a Ginther⁵ hearing, this Court's review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error only warrants reversal when it was a plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant argues that defense counsel was ineffective because he failed to build a defense around the allegedly fabricated charges of possession of a controlled substance. However, there is no evidence on the record to support the defense of fabricated charges. Consequently, defendant was not deprived of the effective assistance of counsel by his attorney's failure to raise the defense. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Defendant also suggests that defense counsel was deficient because he failed to impeach Sergeant Hayward's testimony. The decision of whether or not to delve into all differences in a witness's testimony constitutes a matter of trial strategy for which this Court will not substitute its judgment. *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). Defendant argues that Sergeant Hayward's testimony conflicted with Officer Paul Simpson's testimony regarding the rate of speed the cars were traveling and whether Sergeant Hayward had activated his emergency lights. However, these contentions are not supported by the record. Further, although there were minor inconsistencies between the officers' testimony concerning the events that occurred when defendant was finally stopped, these inconsistencies were brought to the

⁴ Defendant argued that the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), should be used to determine his sentence. Although *Milbourn* remains good law with respect to judicial sentencing guidelines, this Court concluded in *People v Babcock*, 244 Mich App 64, 78; 624 NW2d 479 (2000), that the Legislature did not intend to incorporate the principle of proportionality into the new sentencing framework.

⁵ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

jury's attention. Moreover, defendant has failed to show that he was prejudiced by any of these alleged errors. See *Carbin, supra* at 600.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey